STATE OF MICHIGAN

COURT OF APPEALS

RANO INVESTMENT, INC., Plaintiff-Appellant,	UNPUBLISHED May 19, 2015
v	No. 320225 Wayne Circuit Court
SAID NAMARI, Defendant-Appellee.	LC No. 12-009238-CK

Before: RIORDAN, P.J., and JANSEN and FORT HOOD, JJ.

PER CURIAM.

Plaintiff, Rano Investment, Inc., appeals as of right the trial court order finding that it is not entitled to damages in this action against defendant, Said Namari, for unpaid rent. The trial court's ruling effectively granted defendant's motion for relief from the court's previous order granting plaintiff summary disposition. We reverse.

I. FACTUAL BACKGROUND

Plaintiff Rano is the successor owner of the property located at 2694 West Davison in Detroit, Michigan. The property was leased by Subway Real Estate Corporation (Subway REC). Subway REC then subleased the property to defendant Namari and Abraham Nunu, who operated it as a Subway restaurant. Defendant and Nunu also signed a subtenant guaranty, pursuant to which they agreed to guarantee the payment of rent and all other debts and liabilities arising out of Subway REC's lease. The ensuing litigation resulted from unpaid rents due.

In a separate action, Rano filed suit against Subway REC for unpaid rent. Subway REC filed a third-party complaint against defendant Namari. That lawsuit was resolved pursuant to a settlement agreement between plaintiff Rano and Subway REC. Thereafter, Subway REC dismissed its claims against defendant Namari.

Now, in this case, plaintiff Rano sued defendant Namari for remainder amounts of unpaid rent. Namari eventually sought summary disposition pursuant to MCR 2.116(C)(7), (8) and (10), contending, *inter alia*, that res judicata and collateral estoppel barred the instant litigation and that the expiration of the lease terminated any liability. The trial court disagreed, and found that plaintiff Rano was entitled to summary disposition pursuant to MCR 2.116(I)(2). The court ordered that the parties would have a trial solely on damages.

After losing at the summary disposition stage, Namari filed a motion to compel the production of the settlement agreement from the previous litigation between Rano and Subway REC, which contained a general release. Namari then moved for relief from judgment, MCR 2.612(C). Namari contended that this release was newly discovered and that it extended to him. He posited that the instant litigation was precluded by virtue of the release.

The trial court ruled that the release extended to defendant Namari and accordingly, the trial court found that plaintiff was entitled to $0 damages, which in effect granted defendant's motion for relief from judgment. Plaintiff now appeals.

II. RELEASE

A. STANDARD OF REVIEW

Plaintiff contends that the trial court erroneously interpreted the language in the release as extending to defendant. "The interpretation of a release presents a question of law that this Court reviews de novo." *Radu v Herndon & Herndon Investigations, Inc*, 302 Mich App 363, 374; 838 NW2d 720 (2013).

B. ANALYSIS

"Courts generally apply principles of contract law to disputes involving the terms of a release." *Michigan Head & Spine Institute, PC v State Farm Mut Auto Ins Co*, 299 Mich App 442, 448; 830 NW2d 781 (2013). The intent of the parties governs the scope of the release, and we discern the intent from the words of the release. *Id.* If the language of the release is unambiguous, the intention of the parties must be ascertained from the plain, ordinary meaning in the release. *Id.* The fact that the parties may dispute the meaning of a release does not establish an ambiguity. *Genesee Foods Services, Inc v Meadowbrook, Inc*, 279 Mich App 649, 655; 760 NW2d 259 (2008). Rather, an ambiguity exists only if the language is reasonably susceptible to more than one interpretation. *Id.*

The settlement agreement includes broad language regarding the scope of the release. For example, it releases the relevant parties "from any and all past, present, or future claims, demands, obligations, liens, costs, expenses, actions or causes of action of any whatsoever kind[.]" The trial court focused on this broad language to conclude that regardless of the precise role defendant inhabited relating to Subway REC, he was released from liability because Rano had relinquished virtually every claim relating to unpaid rents.

However, the plain language of the release indicates that an individual or entity must constitute a "released party" to be subject to the broad releasing language. As the language states:

> 1. General Release and Discharge
>
> a. In consideration for the amount set forth in Section 4 of this Agreement, Plaintiff RANO INVESTMENT, INC., and its heirs, executors, administrators, agents, representatives, successors and assigns (collectively the "Releasing Parties") completely release and forever discharge *the*

Defendant[Subway REC], along with each of its past, present, and future officers, directors, principals, agents, representatives, servants, employees, shareholders, subsidiaries, affiliates, parents, partners, suppliers, contractors, insurers, attorneys, consultants, predecessors, successors, dealers and assigns (collectively the "Released Parties") from any and all past, present, or future claims, demands, obligations, liens, costs, expenses, actions or causes of action of any whatsoever kind, whether arising by statute, contract, common law, administrative act, or other authority, whether seeking monetary, equitable, administrative, or other relief, which in any way arise out of the Lease, alleged damage to the Real Property, or which have been or could have been asserted in this action (the "Claims") and/or arise out of the actions and conduct of the Released Parties in preparing their defense to the claims made in this action.

b. The Releasing Parties understand and agree that this Agreement specifically includes the release and discharge of any and all claims and judgments *as between the Releasing and Released Parties* known and unknown to Plaintiff upon its acceptance and execution of this Agreement, including but not limited to, any and all claims for known and unknown, anticipated and unanticipated, and expected and unexpected consequence of any injuries or damages to the Releasing Parties.

c. The Releasing Parties also understand and agree that this Agreement specifically contemplates and effects a general release of any and all claims as *between the Releasing and Released Parties only,* and that the Releasing Parties therefore accept the payment specified in Section 4 of this Agreement as full, complete and final consideration for and satisfaction of any and all claims, judgments, and any and all past, present and future injuries or damages sustained by the Releasing Parties relating to the Lease, Real Property, or as a result of the actions and conduct of the Released Parties in preparing their defense to the claims made in this Action. [Emphasis added.]

The plain and unambiguous language of the release indicates that Rano and Subway REC only intended for the release to apply to claims *between the releasing and released parties*. As such, it was imperative for the trial court to determine whether defendant constituted a released party under the settlement agreement. The trial court failed to do so. In fact, the trial court made several statements revealing its erroneous belief that it did not have to make such a finding.

Essentially, the trial court applied the release to defendant without actually interpreting the language in the release. The trial court overlooked the threshold finding of whether defendant constituted a released party under the terms of the release. Furthermore, that factual determination would not have been appropriate at this stage of the proceedings, as there was insufficient factual development regarding whether defendant was an assign, agent, successor, or dealer with regard to Subway REC.

We agree with plaintiff that the court erred in interpreting the release as applying to all people and entities regardless of whether they constitute a releasing or released party.

III. RELIEF FROM JUDGMENT

A. STANDARD OF REVIEW

Plaintiff also contends that the trial court erred in granting defendant relief from judgment based on the release contained in the settlement agreement between Rano and Subway REC from the previous litigation. We review a trial court's decision to grant relief from a judgment or order pursuant to MCR 2.612(C)(1) for an abuse of discretion. *Peterson v Auto Owners Ins Co*, 274 Mich App 407, 412; 733 NW2d 413 (2007). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

B. ANALYSIS

Plaintiff contends that defendant failed to establish the requirements necessary to justify relief based on newly discovered evidence pursuant to MCR 2.612(C)(1)(b). We agree.

MCR 2.612(C) provides:

> (1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:
>
> > (a) Mistake, inadvertence, surprise, or excusable neglect.
> >
> > (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).
> >
> > (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
> >
> > (d) The judgment is void.
> >
> > (e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.
> >
> > (f) Any other reason justifying relief from the operation of the judgment.

Although defendant asserted that grounds for relief from judgment existed under MCR 2.612(C)(1)(b), (c), (e), and (f), the trial court did not specify the court rule on which it based its holding. Nevertheless, because the trial court relied on the settlement agreement, it appears that its decision was based on newly discovered evidence, MCR 2.612(C)(1)(b).

> There are four requirements that must be met for newly discovered evidence to support a motion for postjudgment relief: (1) the evidence, not simply its materiality, must be newly discovered, (2) the evidence must not be merely

> cumulative, (3) the newly discovered evidence must be such that it is likely to change the result, and (4) the party moving for relief from judgment must be found to have not been able to produce the evidence with reasonable diligence. [*South Macomb Disposal Auth v American Ins Co*, 243 Mich App 647, 655; 625 NW2d 40 (2000).]

Defendant failed to satisfy the requirements of relief from judgment based on newly discovered evidence. After the summary disposition ruling in favor of plaintiff, defendant alleged that he was not provided with the release prior to the ruling. However, defendant failed to assert or demonstrate that he could not have produced or obtained the settlement agreement with reasonable diligence before the trial court granted summary disposition. *South Macomb Disposal Auth*, 243 Mich App at 655. In his motion for relief from judgment, defendant asserted that he filed his "First Request to Produce upon Plaintiff Rano . . . in February 2013." The register of actions indicates the only action that occurred in February 2013 was the filing of a proof of service for a subpoena. There is no indication that this included a request for the production of the settlement agreement. Nor did defendant specifically request the settlement agreement in the notice of deposition *duces tecum* for plaintiff.

In fact, defendant did not seek production of the settlement agreement until *after* the trial court granted summary disposition in favor of plaintiff. Defendant was aware of the previous litigation between Rano and Subway REC, as he was a third-party defendant in the case. He also requested evidence of payments received by plaintiff from Subway REC, and expressly questioned Nunu, as a corporate representative of plaintiff, regarding the amount that plaintiff recovered from Subway REC through the settlement of the prior litigation. Yet, it was not until well after the summary disposition motion that defendant filed a motion to compel production of the settlement agreement between Rano and Subway REC.

Defendant provides no explanation for why he did not seek to compel production of the settlement agreement specifically, and the release therein, in a timely fashion. He could have exercised due diligence in requesting the document before the trial court entered its summary disposition order. He chose not to do so for whatever reason. Therefore, under the terms of MCR 2.612(C)(1)(b), defendant was not entitled to relief from judgment because he did not exercise reasonable diligence in seeking the production of this document. *South Macomb Disposal Auth*, 243 Mich App at 655-656 (the trial court abused its discretion in granting the plaintiff's motion for relief from the judgment because the "plaintiff failed to demonstrate that, with the exercise of reasonable diligence, it would not have been able to produce the newly discovered evidence at an earlier time").

The trial court granted defendant relief from judgment without even referencing the necessary elements of defendant's motion under MCR 2.612(C)(1)(b). The court also failed to explore any explanation for defendant's failure to produce the settlement agreement before

summary disposition. The trial court erred in granting defendant relief under these circumstances.[1]

IV. CONCLUSION

Because defendant Namari failed to demonstrate that he was entitled to relief from judgement based on newly discovered evidence, MCR 2.612(C)(1)(b), the trial court erred in entering judgment of no damages, which effectively granted his motion for relief from judgment. We reverse. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood

[1] Even if we were to review this issue for plain error, we still find that reversal is warranted. *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 387; 803 NW2d 698 (2010); *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010).